No. 12,197

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUISE HAMILTON,
Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,
Appellee.

Surrebuttal Brief on Behalf of Appellant, Louise Hamilton

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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This is in reply to respondent's Rebuttal Brief filed shortly before the oral argument and is submitted by leave of the Court granted at the oral argument on October 7, 1949.

In appellant's previous briefs she has argued (1) a witness not a party to the administrative proceeding will not be required to comply with a subpoena of an administrative tribunal where she interposes an "appropriate defense" such as a clear and affirmative showing of no pos-

sible jurisdiction or authority to proceed in the administrative hearing to which the subpoena is ancillary; (2) that the 1947 amendments to the National Labor Relations Act deprive the Board and the general counsel of any authority to issue a complaint (the issuance of which is necessary to commence a proceeding before the Board) where the charging union has not complied with the non-Communist affidavit provisions [Section 9(h)] or where a charge has not been filed or where a charge has not been served within six months [Section 10(b)]; and (3) it is affirmatively clear upon the face of the formal papers of the Board that it can have no possible jurisdiction or authority to proceed in the case in aid of which the subpoena involved in this appeal was issued.

Respondent's Rebuttal Brief contends that the amendments adding Section 9(h), with respect to non-Communist affidavits, and to Section 10(b), withdrawing and denying jurisdiction to issue a complaint where a charge has not been served within six months, are not to be considered by the courts in subpoena enforcement proceedings. Respondent asserts, in substance, that the Board may carry on a proceeding in direct and flagrant violation of these restrictions on its statutory jurisdiction and get affirmative equitable relief from the courts, in the form of sanctions to enforce its subpoena issued in such a proceeding. Respondent argues not merely that the courts must ignore its clear and undeniable abuse of its power, but that they must assist its abuse by compelling witnesses to give up their civil rights of privacy.

Appellant answers that her civil right, which Mr. Justice Brandeis has characterized as the most comprehensive of

rights and the right most valued by civilized men,[1] is protected by both statute and Constitution against such an arbitrary and unreasonable infringement. She, necessarily, must present her defense to this infringement of her civil right at this time. Once she has been compelled, by the sanctions available to the courts, to appear before the Board and testify, her right of privacy has been completely and irremediably destroyed.

The Individual's Right of Privacy, Embracing the Right to Not Testify, Is Protected by the Constitution and the Statutes

Appellant has a right that she relies upon in this proceeding as her defense against the Board's demand that the courts order her to testify. It is based on the Fourth Amendment to the Constitution, the Administrative Procedure Act, and numerous cases fixing limitations upon the interference that will be brooked in the form of administrative subpoenas. The field of her "appropriate defenses" to the administrative subpoena is broader, she submits, than is the field of defenses to judicial subpoenas; it is broader by virtue of the specific statutory provisions as well as by virtue of the differences between courts, steeped in the protection of the individual, and administrative tribunals, inherently steeped in the enforcement of the public interest, a field in which they have justly acquired a reputation for expertness and ability.

Congress, recognizing that administrative tribunals should be intent on their specialized protection of the public, has denied them the right to enforce their own subpoenas; instead it has granted the courts *jurisdiction*

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1. *Olmstead v. United States,* 277 U.S. 438, 478-479.

to enforce administrative subpoenas. By the Administrative Procedure Act, it has required the courts, when requested to enforce an administrative subpoena, to "inquire generally into the legal and factual situation and be satisfied that the agency could possibly find that it has jurisdiction" before ordering enforcement.[2] On the basis of these statutory limitations, appellant claims that she should not be compelled to testify in this proceeding because her defenses are "appropriate" to an administrative subpoena though they might not be sufficient were the subpoena issued by a court in aid of a proceeding being carried on before it.

In this respect, she calls the attention of the court to the provisions of the 1947 amendment to Section 11(1) of the Act. This makes the issuance of a subpoena by the Board mandatory upon the filing of an application for it. Thus in this case there has been no exercise of discretion by the Board that a subpoena should issue; discretion as to issuance and enforcement is solely a matter for the court in this proceeding. The statute provides for no consideration for the rights of an individual called upon to testify until enforcement proceedings begin.

The Supreme Court on several occasions has clearly pointed out that there must be a compromise between the public interest, which requires *some* intrusion on private security, and the civil right of privacy, which must be safeguarded against arbitrary abuse of governmental power. These interests must be balanced. The courts of justice in supervising the propriety of administrative use

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2. Senate Report on Section 6(c) of the Administrative Procedure Act.

of the subpoena power maintain that balance.[3] In a recent Supreme Court case on this issue, the Court stated: "The basic compromise has been worked out in a manner to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed. The latter are . . . the interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest. Officious examination . . . can become persecution when carried beyond reason."[4]

Appellant claims that the reasons advanced by the Labor Board in its Rebuttal Brief demonstrate that she rightfully claims protection against this subpoena, which is simply "officious intermeddling," because not authorized by law in this proceeding.

The Right to Not Testify Is Entitled to Protection Against a Claim of Administrative Jurisdiction That Is in Direct and Flagrant Contravention of Law.

The Board argues that the question of whether a charge was filed and was served within six months is a matter

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3. See dissent of Mr. Justice Cardozo in *Jones v. Securities and Exchange Commission,* 298 U.S. 1, 32, 33, in which he clearly distinguishes star chamber procedure from modern administrative procedure in carrying on inquiries, where "the propriety of every question in the course of the inquiry * * * (is) subject to the supervision of the ordinary courts of justice."

4. *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 213.

that must be "initially" determined only by it and involves questions of fact as well as a question of law. This argument, which would be material in opposition to an injunction against the Board's proceeding with a hearing outside its jurisdiction, is wholly irrelevant in this proceeding.

The court is required, we have seen, to consider generally the legal and factual situation at this time. The court commits error if it enforces a subpoena without being satisfied that the tribunal can possibly find it has jurisdiction. Here the facts, the ultimate facts or the conclusions of fact as well as the evidentiary facts, are undisputed. The alleged unfair labor practice occurred about August 1, 1946; the alleged charge was served in February, 1948.

There is nothing esoteric about the number of months intervening between these dates that requires the "expertness" of an administrative tribunal to count them. The cases cited by the Board relating to "evidentiary facts"—*Gray v. Powell*, 314 U.S. 402, 412, and *United States v. Louisville & Nashville R. R.*, 235 U.S. 314, 320—merely hold that the courts should not substitute their judgment for that of the administrative tribunal as to whether the evidentiary facts show, respectively, that a railroad was a "producer" of coal or that the granting of a reshipping privilege was an "undue and unreasonable preference." They do not hold that a court, in the proper case here before it, cannot count the months from August, 1946, to February, 1948.

Neither is the respondent's citation of *Newport News Co. v. Schauffler*, 303 U.S. 54, 57, in point. There the company sought to litigate whether it was engaged in inter-

state commerce, and to litigate the facts, in court and prior to the initial action on the issues by the Board. The case involved neither the question of what is an appropriate defense an application for enforcement of a subpoena nor a question limited to issues of law appearing on the face of the Board's own allegations.

The Board further contends, "The jurisdiction of the Board having attached prior to the enactment of the Labor-Management Relations Act continued after, and was unimpaired by, the amendments effected by that Act" (Rebuttal Brief, p. 8). This bold conclusion completely ignores the power of Congress to take away jurisdiction and its specific language that "no complaint shall issue."

We submit that our previous briefs have clearly established that the service of a charge within 6 months is jurisdictional to the issuance of a complaint and that the Board's own papers clearly and affirmatively show that this jurisdictional requirement cannot be satisfied in this proceeding. It thus being impossible for the Board to find it has jurisdiction in this proceeding, the court must refuse enforcement of the subpoena. *Perkins v. Endicott-Johnson Corp.*, 128 F.(2d) 208, 215, 224.[5]

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5. See, in addition to the Senate Report (note 2 above), the language of Judge Frank in *Perkins v. Endicott-Johnson Corp.*, 128 F.(2d) 208, 215, 224: "When * * * a fundamental factor—a lack of all possible statutory authority to compel the witnesses to answer—is apparent on the very face of the record before the court, it should, of course, refuse to enforce the administrative subpoena." (This lack is apparent on the face of the record here.)

"As we have seen, an administrative proceeding might, on the face of the record, be so clearly without legal foundation that a court would be obliged to refuse to enforce a subpoena issued in aid of that proceeding. Thus, if, in a National Labor Relations Board case, the Board's order or its pleadings in a suit to enforce

The Right to Not Testify Is Entitled to Protection Against a Claim of Administrative Jurisdiction That Is Being Conclusively Presumed by a Board That Affirmatively and Openly Refuses to Exercise Any Jurisdiction to Determine Jurisdiction.

With respect to the non-Communist affidavit issue, the Board conclusively presumes it has jurisdiction. Thus in its Rebuttal Brief, the Board states that it "does not permit the parties in a case before it to litigate the compliance status of any participating union" (p. 9). It thus refuses to consider whether or not it has jurisdiction. It is refusing to exercise any jurisdiction it has to determine its jurisdiction initially.

The Board asserts in its Rebuttal Brief, p. 11, "Whether a complaint should issue in any given case rests in the administrative discretion of the General Counsel (formerly the Board). This discretion is not reviewable." This is correct where the General Counsel *refuses* to issue a complaint that he has jurisdiction to issue. It is obviously incorrect when he seeks to act outside his jurisdiction. When he acts without jurisdiction he acts merely as a private citizen, not as a public officer. A complaint so "issued" is no complaint at all, and it must be treated as a nullity whenever questioned thereafter in a proper proceeding. We have shown that this is the proper time for a witness

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its subpoena, affirmatively stated or admitted that the respondent employer was engaged in a business having no possible connection with interstate commerce, no court could properly order compliance with the subpoena." An exactly analogous situation is presented to the court in this case. To enforce the subpoena, we submit, is to overrule the *Endicott-Johnson* and *Oklahoma Press Publishing* rationale as to the court's duty and power in exercising its discretion on an application to enforce an administrative subpoena.

to raise such a question, that it is a proper question for her to raise, and that the "complaint" is a nullity.

Respondent replies that the issuance of a complaint by the General Counsel is an act of discretion similar to the President's calling out of the militia; thus it cites *Martin v. Mott*, 12 Wheat. 19, and similar cases, for the proposition that a court—and so too the Board[6]—cannot consider whether he acted within his jurisdiction in issuing the complaint. There is no analogy between the President's calling out the militia to oppose the British invasion of the War of 1812 and the issuance of a complaint against a union or employer who allegedly committed an unfair labor practice.

The question of whether the affidavits are on file is clearly a question that is susceptible of adjudication at a formal hearing. If the issue is joined by the pleadings before the Board, the General Counsel can readily present evidence as to the papers in the files. If the issue is not joined, evidence is not necessary. It would not frequently be required, but the issue must be open to litigation for it goes to the Board's jurisdiction.

The fundamental difference between the parties is clear from respondent's final citation, *Perkins v. Lukens Steel Co.* It is admitted that the appellant is not entitled to go to court to attempt to compel the Board to comply with every element of the law in issuing all complaints. If she were here seeking a mandatory injunction to require the General Counsel to determine there was compliance in

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6. The Board, however, itself has reviewed and reversed the General Counsel's interpretation of the non-Communist affidavit provision (*Matter of Northern Virginia Broadcasters Inc.*, 75 N.L.R.B. 11).

every case, and not merely in the Typical case referred to on page 13 of the Board's Rebuttal Brief, she would be seeking to vindicate the public interest, a matter that generally should be left to the political process (cf. *Perkins v. Lukens Steel Co.,* 310 U.S. 113, 125, referred to at p. 15, Rebuttal Brief).

Appellant, however, relies on her right *to not testify* except as required by the Administrative Procedure Act and the leading cases such as *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186; *Perkins v. Endicott-Johnson Corp.,* 128 F.(2d) 208, and *Jones v. Securities and Exchange Commission,* 298 U.S. 1. She claims that the law does not require her to testify in an administrative proceeding that, in the eyes of the law, has not begun. She asserts that the Board cannot find it has jurisdiction in view of the non-Communist affidavit requirement, because it refuses to hear the matter and, refusing to hear, it cannot decide or find. Similarly she asserts that the Board cannot find it has jurisdiction in view of the requirement that a charge be filed and be served within six months because the Board admits the absence of service until some eighteen months after the acts.

CONCLUSION

Appellant believes it is manifest that she is entitled to call the attention of the court to the complete impossibility of the Board's finding it has jurisdiction in the proceeding in which the Board would have her testify, that the Administrative Procedure Act and the recent Supreme Court cases require this court to balance her private right to not testify against the public interest being ad-

vanced by the Board, and that in this case there is an arbitrary and unreasonable attempt by government officials, acting without any color of authority in the Board's proceeding, to ask this court to compel her to testify although they admit the facts showing they have no jurisdiction on one score and although on another they flatly refuse to consider whether they have jurisdiction by conclusively presuming that their action is within their jurisdiction. To seek testimony in such a proceeding, is the type of "officious intermeddling" to which the courts will not require submission. Reasonable consideration to private rights in the balance before this court shows, we respectfully submit, no overbalancing public interest that will justify an invasion of appellant's civil rights.

Respectfully submitted,

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